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Article (Accepted Version)

Bremner, Philip (2017) Surrogacy and single parents following Re Z. *Edinburgh Law Review*, 21 (2). pp. 281-286. ISSN 1364-9809

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# Surrogacy and Single Parents Following *Re Z*

## A. INTRODUCTION

In 2016 the Law Commission of England and Wales sought views on whether the law governing surrogacy was keeping pace with social change or was in need of reform.<sup>1</sup> A decision is expected later this year on whether surrogacy will be included in the Law Commission's Thirteenth Programme of Law Reform. The key pieces of legislation regulating surrogacy, namely the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008 (the "2008 Act"), apply in both Scotland and England & Wales. Therefore, the outcome of the Law Commission's consultation will have implications in both jurisdictions.

One of the main issues the Law Commission has highlighted as potentially in need of reform is the courts' lack of power to make parental orders under section 54 of the 2008 Act in favour of single persons. This issue arose in the recent case of *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*<sup>2</sup> and led the High Court to make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In *Re Z (A Child) (No 2)*,<sup>3</sup> the court held that section 54(2) is incompatible with article 14 ECHR taken in conjunction with article 8. This in turn prompted the Government to ask the Law Commission to consider including a project on surrogacy in its next programme of work.<sup>4</sup> On the basis of the High Court's declaration of incompatibility, legislative review of this area is desirable and the Law Commission's consultation is, commendably, the first step towards this.

However, the High Court's decision to make a declaration of incompatibility rather than read down the provision to make parental orders available to single applicants seems somewhat arbitrary in light of the court's willingness to read down the other requirements, in particular the time limits, contained in section 54 of the 2008 Act. While the way the courts have read down some of the other requirements arguably stretch the interpretative function of the court, I argue that it would not have been inconsistent with the court's flexible approach to the interpretation of section 54 to read down that section, in the interests of justice for all

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<sup>1</sup> 'Law Commission Potential Projects' 2016 46 (8) Family Law 931.

<sup>2</sup> <http://www.lawcom.gov.uk/surrogacy/>.

<sup>3</sup> [2015] EWFC 73.

<sup>4</sup> [2016] EWHC 1191 (Fam).

<sup>4</sup> Lord Prior of Brampton, *Surrogate Motherhood: Written Question*, HL 218 (7 June 2016).

involved, so as to recognise a single parent following surrogacy, rather than making a declaration of incompatibility.<sup>5</sup> Nevertheless, given that such a declaration has been made it is incumbent on the Government to bring forward proposals to amend the 2008 Act in order to allow a parental order to be made in favour of a single person.

## **B. SECTION 54**

There is a dearth of reported Scottish case law concerning parenthood following surrogacy. This is in stark contrast to the proliferation of cases coming before the courts in England & Wales. Nevertheless, parental orders following surrogacy are being sought and granted in Scotland. Alan Inglis notes that there has ‘been a steady increase in the number of completed surrogacy arrangements in Scotland – in 2011 there were a total of 15 parental order made in Scottish courts.’<sup>6</sup> Furthermore, it seems unlikely that the Scottish courts would depart significantly from the approach taken in England & Wales. In *C v S*,<sup>7</sup> for example, one of the few reported Scottish parental order cases, the Inner House of the Court of Session indicated its willingness to adopt a loose interpretation of the conditions surrounding payment of a surrogate under section 30 of the Human Fertilisation and Embryology Act 1990, which predated the current provision. This predates much of the English case law on this issue.

The 2008 Act sets out the following key requirements that must be fulfilled before a court can grant a parental order:

- At least one of the intended parents must be the child’s genetic parent.<sup>8</sup>
- The intended parents must be husband and wife, civil partners or ‘two persons who are living as partners in an enduring family relationship.’<sup>9</sup>
- The intended parents must bring the application within six months of the birth of the child.<sup>10</sup>
- The child must live with the intended parents, either or both of whom must be domiciled in the UK.<sup>11</sup>

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<sup>5</sup> This does not mean that a single parent can never be recognised following surrogacy. It would still be possible for a single parent to seek an adoption order. However, this is a longer and more complex route compared to a section 54 order, which is the most appropriate and streamlined route in cases of surrogacy.

<sup>6</sup> A Inglis, “Hagar’s baby: surrogacy arrangements” (2014) SLT (News) 105.

<sup>7</sup> 1996 SLT 1387.

<sup>8</sup> S 54 (1).

<sup>9</sup> S 54 (2).

<sup>10</sup> S 54 (3).

- Both of the intended parents must be over eighteen.<sup>12</sup>
- The birth mother (and any other legal parent) must freely give informed consent to the order unless they cannot be found or are incapable of agreeing.<sup>13</sup>
- The birth mother's consent must be given more than six weeks after birth.<sup>14</sup>
- There must not have been the exchange of any payment beyond reasonable expenses, unless authorised by the court.<sup>15</sup>

These requirements can be divided into two categories. Firstly, there are those requirements that seem to afford the courts some discretion in how they are applied. These include determining whether a relationship is an enduring family one, determining whether it is possible for the mother to give consent and determining whether a payment exceeds reasonable expenses and, if so, whether to authorise it anyway. The remaining requirements do not seem to afford the courts any discretion. These include the requirement that one of the applicants is the child's genetic parents, that there must be two applicants, that they must be over eighteen and that the application must be brought within six months.

Claire Fenton-Glynn has correctly observed that the approach taken by the courts in England & Wales to the interpretation of a number of these requirements is one "in which the law has been stretched and manipulated to fit the requirements of justice".<sup>16</sup> More specifically, the courts have interpreted the statutory provisions, as far as possible, in order to be consistent with the best interests of the child. The courts are required to do this by the Human Fertilisation and Embryology (Parental Orders) Order 2010,<sup>17</sup> which imported section 1 of the Adoption and Children Act 2002, for England, and section 14 of the Adoption and Children (Scotland) Act 2007, for Scotland, into section 54 of the 2008 Act. This made the welfare of the child the court's paramount consideration when deciding whether or not to make a parental order. As a result, the courts have authorised payments that clearly exceed reasonable expenses<sup>18</sup> and dispensed with the consent of the birth mother despite concerns

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<sup>11</sup> Section 54(4).

<sup>12</sup> Section 54(5).

<sup>13</sup> Section 54(6) and (7).

<sup>14</sup> Section 54(7).

<sup>15</sup> Section 54(8).

<sup>16</sup> Claire Fenton-Glynn, "The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law" (2015) 27 Child and Family Law Quarterly 83.

<sup>17</sup> SI 2010/985.

<sup>18</sup> For example, *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156; *J v G* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297; *Re C (Parental Order)* [2013] EWHC 2413 (Fam).

about exploitation.<sup>19</sup> For the purpose of this analysis, however, I will focus on the requirement that there must be ‘two persons’ in order for the court to grant a parental order. I will contrast this with the way in which the courts have interpreted the six-month time limit.

### C. THE CASE LAW: SINGLE PARENTS VS TIME LIMITS

*Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*<sup>20</sup> concerned a child, Z, who was born as a result of surrogacy in the USA using the applicant’s sperm. Under the law of Minnesota where the child was born, the applicant had become the sole legal parent with the consent of the birth mother. When the child was brought to the UK, the birth mother further consented to a parental order being made under section 54 of the 2008 Act. The sole issue for the court was whether such an order could be made in favour of a single person. Sir James Munby, the President of the Family Division, refused the application on the basis that there was a clear distinction between an adoption order, which is available to single people, and a parental order, which is not. Referring to the parliamentary debates leading to the 2008 Act where a Government minister voiced this policy distinction, the President held that it would be contrary to the intention of Parliament and a fundamental feature of the legislation to interpret section 54 as being available to single applicants.<sup>21</sup> As a result, the President refused to read down section 54(1) in accordance with section 3(1) of the Human Rights Act 1998 but instead, when later asked to by the applicant in the subsequent case of *Re Z (A Child) (No 2)*,<sup>22</sup> issued a declaration of incompatibility leaving the executive and parliament to address the issue. This meant that Z remained a ward of court and that the applicant would need to seek an adoption order in accordance with the Adoption and Children Act 2002 in order to become Z’s legal parent, even though the court recognised that ‘[f]or reasons that are well understood and apparent from a number of authorities which there is no need for me to refer to, the father would very much prefer to be able to obtain a parental order.’<sup>23</sup>

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<sup>19</sup> For example, *Re D (A Child)* [2014] EWHC 2121 (Fam); *Re D and L (Minors) (Surrogacy)* [2012] EWHC 2631 (Fam).

<sup>20</sup> [2015] EWFC 73.

<sup>21</sup> *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73 [35] – [39].

<sup>22</sup> [2016] EWHC 1191 (Fam).

<sup>23</sup> *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73 [3]. As Theis J made clear in *B v C (Surrogacy: Adoption)* [2015] EWFC 17 [26], section 92 of the Adoption and Children Act 2002 requires potential adopters to arrange adoptions

As Welstead notes, ‘the decision appears to be a departure from the previous liberal approach of the judiciary in their interpretation of the surrogacy provisions of the HFEA 2008’.<sup>24</sup> In particular, the approach Sir James Munby took in *Re Z* contrasts with his more liberal interpretation, in *Re X (A Child) (Surrogacy: Time Limit)*,<sup>25</sup> of section 54’s six-month time limit. That case concerned an application for a parental order of a child born following surrogacy in India in 2011. The parents and child lived in India until they decided to return to the UK in 2013, shortly after which they separated. During proceedings under the Children Act 1989 for residence of the child it became clear that neither of the intended parents were legal parents as they had never sought a parental order. In a previous High Court case, Hedley J had described the six-month time limit as ‘non-extendable’.<sup>26</sup> That decision applied the clear language of the statute and was followed in subsequent cases.<sup>27</sup> Despite this, the President in *Re X* held that section 54(3) did not prevent the court from making a parental order beyond the six-month time limit and in that case found that the welfare of the child required the court to make the order.<sup>28</sup>

In support of his decision Munby P reasoned as follows:

Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible

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through an adoption agency. Failure to do this constitutes a criminal offence under section 93 of the Adoption and Children Act 2002. Seeking an adoption order is, therefore, more onerous on intended parents than seeking a parental order. See also the President of the Family Division’s comments in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) [7]: “Adoption is not an attractive solution given the commissioning father’s existing biological relationship with X. As X’s guardian put it, a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X’s identity: the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents”.

<sup>24</sup> M Welstead, ‘Surrogacy Reform Now’ [2015] 45 (Dec) Family Law 1554.

<sup>25</sup> [2014] EWHC 3135 (Fam).

<sup>26</sup> *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) [12].

<sup>27</sup> For example *JP v LP and Others (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam).

<sup>28</sup> *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) [57].

result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical.<sup>29</sup>

Munby P's reasoning here relies heavily on the nature of a parental order and the effect it has on all the parties. Given this, the court was permitted, and required in the interests of child welfare, to make a parental order despite the expiration of the time limit. Furthermore, Munby J held that even if the statutory provision could not ordinarily bear such an interpretation, it should be read down in accordance with the Human Rights Act 1998, given the fundamental importance of a parental order to the child. He noted that "section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family".<sup>30</sup>

#### **D. CONCLUSION**

As a number of the judges involved in these surrogacy cases have recognised, the status of legal parenthood is of fundamental importance to both parents and children. Therefore, the courts' ability to make parental orders should be governed by the best interests of all involved. This must include and perhaps even prioritise the welfare of the child, established in a relational context as part of a family.<sup>31</sup> It is arguable that legislative reform is the ideal remedy for deficiencies in legislation that prevent parental orders being granted where all parties consent. It is, therefore, encouraging that the Law Commission might examine this area of law. However, given that the courts have breached a 'bright line' rule (in relation to the six month time limit) it remains unclear why, and unfortunate that, they did not pursue a similarly just result in *Re Z* by creating the facility for full single parenthood by surrogacy.

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<sup>29</sup> *Ibid.* [55].

<sup>30</sup> *Ibid* [54].

<sup>31</sup> See J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 *Legal Studies* 480.

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